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Congressional Power to Regulate Noncommercial Activity Overseas: Interstate Commerce Clause Precedent Indicates Constitutional Limitations on Foreign Commerce Clause Authority

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CONGRESSIONAL POWER TO REGULATE NONCOMMERCIAL ACTIVITY OVERSEAS: INTERSTATE COMMERCE CLAUSE PRECEDENT INDICATES CONSTITUTIONAL LIMITATIONS ON FOREIGN COMMERCE CLAUSE AUTHORITY

Jeff Christensen

Abstract: Although the U.S. Supreme Court has not yet ruled any statutes criminalizing the conduct of Americans overseas unconstitutional under the Foreign Commerce Clause, three U.S. Courts of Appeals decisions use the concept of enumerated powers—important in U.S. Supreme Court decisions that invalidate statutes grounded in the Interstate Commerce Clause—to suggest limitations on Congress's Foreign Commerce Clause power. In two decisions, the U.S. Courts of Appeals for the Fifth and Ninth Circuits employed the U.S. Supreme Court's Interstate Commerce Clause framework when analyzing statutes under the Foreign Commerce Clause. In so doing, these courts suggest that Foreign Commerce Clause power is not plenary—the constitutional concerns driving the U.S. Supreme Court to recognize limitations on Congress's Interstate Commerce Clause power also impose limitations on Congress's Foreign Commerce Clause power. In the third decision, the Ninth Circuit Court of Appeals suggested a similar limitation, holding that Congress could enact a statute under its Foreign Commerce Clause power only if the statute demonstrated a constitutionally tenable nexus with foreign commerce by including an economic component. Section 2423(f)(1) of the PROTECT Act, which criminalizes noncommercial sexual abuse of minors overseas, fails to withstand Foreign Commerce Clause scrutiny under current U.S. Courts of Appeals analyses because the statute regulates criminal conduct occurring outside the channels of foreign commerce and does not include an economic component.

In *United States v. Clark*,[1] the U.S. Court of Appeals for the Ninth Circuit held that 18 U.S.C. § 2423(f)(2),[2] a provision of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act),[3] did not exceed Congress's enumerated authority "to regulate Commerce with foreign Nations."[4] In rejecting the defendant's Foreign Commerce Clause challenge against § 2423(c), the Ninth Circuit deliberately limited its holding to § 2423(f)(2)[5]—which prohibits U.S. citizens and permanent residents from engaging in

1. 435 F.3d 1100 (9th Cir. 2006).

2. Although subsections (c) and (f) of 18 U.S.C. § 2423 operate together, for clarity this Comment will reference only the applicable component of subsection (f) in place of both subsections whenever possible.

3. Pub. L. 102-21, 117 Stat. 652.

4. 435 F.3d 1100, 1102 (9th Cir. 2006) (quoting U.S. CONST. art. I, § 8, cl. 3).

5. *See id.* at 1117.

commercial sex acts with minors overseas.[6] The court did not address a different part of the PROTECT Act, namely 18 U.S.C. § 2423(f)(1),[7] which criminalizes noncommercial sexual abuse of minors overseas.[8]

This Comment addresses Congress's constitutional authority under the Foreign Commerce Clause to enact § 2423(f)(1) of the PROTECT Act. It argues that, at least under the analyses currently employed by the U.S. Courts of Appeals,[9] the criminalization of noncommercial sexual abuse of minors overseas falls outside the legitimate scope of Congress's Foreign Commerce Clause authority. The current Foreign Commerce Clause analyses in the U.S. Courts of Appeals draw heavily on the U.S. Supreme Court's Interstate Commerce Clause analysis.[10] Accordingly, Congress's power to enact legislation under the Foreign Commerce Clause appears limited to laws that would either satisfy the Interstate Commerce Clause framework or demonstrate a tenable nexus with foreign commerce by including an economic component. Section 2423(f)(1) does not withstand Foreign Commerce Clause scrutiny under current U.S. Courts of Appeals analyses because the provision fails to demonstrate either of these required connections to commerce.

Part I of this Comment describes § 2423(f)(1) of the PROTECT Act. Part II discusses the limits of congressional authority under the Interstate Commerce Clause. Part III describes two U.S. Courts of Appeals decisions that evaluate Foreign Commerce Clause challenges by employing the U.S. Supreme Court's Interstate Commerce Clause analysis. Part IV examines a slightly different analysis, applied by the Ninth Circuit in *Clark*, which requires that the text of the challenged

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6. *See* 18 U.S.C.A. § 2423(c) (West 2000 & Supp. 2006) ("Engaging in illicit sexual conduct in foreign places.—Any United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both."); § 2423(f) ("Definition.—As used in this section, the term 'illicit sexual conduct' means . . . (2) any commercial sex act (as defined in section 1591) with a person under 18 years of age.").

7. *See Clark*, 435 F.3d at 1105.

8. *See* 18 U.S.C.A. § 2423(c); *id.* § 2423(f) ("Definition.—As used in this section, the term 'illicit sexual conduct' means (1) a sexual act (as defined in section 2246) with a person under 18 years of age that would be in violation of chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States . . . ."). Chapter 109A criminalizes various forms of noncommercial sexual abuse. *See id.* § 2241 (aggravated sexual abuse); *id.* § 2242 (sexual abuse); *id.* § 2243 (sexual abuse of a minor or ward).

9. *See Clark*, 435 F.3d at 1109–17; United States v. Bredimus, 352 F.3d 200, 204–08 (5th Cir. 2003); United States v. Cummings, 281 F.3d 1046, 1048–51 (9th Cir. 2002).

10. *See Clark*, 435 F.3d at 1109–17; *Bredimus*, 352 F.3d at 204–08; *Cummings*, 281 F.3d at 1048–51.

statute demonstrate a constitutionally tenable nexus with foreign commerce. Applying those analyses to § 2423(f)(1), Part V argues that Congress's criminalization of noncommercial sexual abuse of minors overseas cannot be justified solely on the basis of Congress's Foreign Commerce Clause authority.

I. THE PROTECT ACT CRIMINALIZES NONCOMMERCIAL SEXUAL ABUSE OF MINORS OVERSEAS

Section 2423(f)(1) of the PROTECT Act criminalizes conduct occurring outside U.S. territory regardless of whether that conduct is commercial in nature.[11] Section 2423(c) provides that "[a]ny United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both."[12] Section 2423(f)(2), in turn, defines the phrase "illicit sexual conduct" as "any *commercial* sex act . . . with a person under 18 years of age."[13] Section 2423(f)(1) defines the same phrase as any "sexual act,"[14] whether commercial or not, that would violate chapter 109A [18 U.S.C. §§ 2241–2243],[15] which criminalizes various forms of sexual abuse.[16] Notably, none of the prohibitions in chapter 109A require that the abuse take place in a commercial context.[17] Accordingly, § 2423(c) and (f)(1) criminalizes the sexual abuse of minors overseas regardless of whether that abuse takes place in a commercial context.

Although Congress did not restrict its criminalization of overseas sexual abuse to only that occurring in commercial contexts,[18] it nonetheless appears that Congress rooted its authority to enact the PROTECT Act in its power under the Foreign Commerce Clause.[19] The

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11. *See* 18 U.S.C.A. § 2423(c), (f); *Clark*, 435 F.3d at 1105.

12. 18 U.S.C.A. § 2423(c).

13. *Id.* § 2423(f) (emphasis added). "[C]ommercial sex act" is defined as "any sex act, on account of which anything of value is given to or received by any person." 18 U.S.C. § 1591(c) (2000).

14. 18 U.S.C.A. § 2423(f) (West 2000 & Supp. 2006).

15. *See id.*

16. *See supra* note 8.

17. *See* United States v. Clark, 435 F.3d 1100, 1105 (9th Cir. 2006).

18. *See* 18 U.S.C.A. § 2423(c), (f).

19. *See Clark*, 435 F.3d at 1114 (noting "the phrase 'travels in foreign commerce' unequivocally establishes that Congress specifically invoked the Foreign Commerce Clause").

PROTECT Act itself contains no explicit statement of lawmaking authority, but the statutory language in § 2423(c) was first proposed as a provision in the Sex Tourism Prohibition Improvement Act of 2002 (STPI Act).[20] The House of Representatives Report accompanying the STPI Act included a "Constitutional Authority Statement" expressly identifying the Commerce Clause as Congress's constitutional authority for enacting the STPI Act.[21] Although the STPI Act died in committee,[22] its relevant language was incorporated verbatim into the PROTECT Act under § 2423.[23] Thus, it is reasonable to conclude that Congress intended to rely on its Foreign Commerce Clause power when it enacted § 2423(c).[24]

II. CONGRESS'S CONSTITUTIONALLY ENUMERATED AUTHORITY TO REGULATE COMMERCE IS LIMITED

The U.S. Supreme Court has acknowledged that Congress's power under the Commerce Clause is broad,[25] and that Congress's Foreign Commerce Clause power is greater than its Interstate Commerce Clause power.[26] However, the Court has often reiterated the axiom that our federal government is one of enumerated powers.[27] As such, there are limitations on how far Congress's Commerce Clause authority extends.[28] These limitations are illustrated in the Court's seminal decisions on Congress's Interstate Commerce Clause power—*United States v. Lopez*[29] and *United States v. Morrison*.[30]

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20. *See id.* at 1104 (discussing PROTECT Act's legislative origins).

21. *See* H.R. REP. NO. 107-525, at 5 (2002); *see also Clark*, 435 F.3d at 1104 (discussing PROTECT Act's legislative origins).

22. *See Clark*, 435 F.3d at 1104 (discussing PROTECT Act's legislative origins).

23. *Compare* H.R. REP. NO. 107-525, at 2, *with* 18 U.S.C.A. § 2423(c).

24. *See Clark*, 435 F.3d at 1104.

25. *See* United States v. Morrison, 529 U.S. 598, 608 (2000).

26. *See* Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1979).

27. *See, e.g., Morrison*, 529 U.S. at 607 ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution."); United States v. Lopez, 514 U.S. 549, 552 (1995) ("The Constitution creates a Federal Government of enumerated powers.").

28. *See Morrison*, 529 U.S. at 608 (citing *Lopez*, 514 U.S. at 557). Although the U.S. Supreme Court has found Congress's Commerce Clause power over Indian tribes to be plenary, see, for example, United States v. Lara, 541 U.S. 193, 200 (2004), no court has applied federal Indian law jurisprudence when analyzing Congress's authority under the Foreign Commerce Clause.

29. 514 U.S. 549 (1995).

30. 529 U.S. 598 (2000). This Comment does not address the U.S. Supreme Court's recent Interstate Commerce Clause decision, *Gonzales v. Raich*. 545 U.S. 1, 125 S. Ct. 2195 (2005). In

A. The U.S. Supreme Court Has Only Declared That Congress's Foreign Commerce Clause Power is Broader Than Its Interstate Commerce Clause Power

The Commerce Clause of the U.S. Constitution gives Congress broad power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[31] Indeed, the U.S. Supreme Court has never invalidated a statute because Congress exceeded its authority to regulate foreign commerce in its enactment.[32] Thus, it is difficult to say with any certainty how the Court would analyze a federal statute so challenged under the Foreign Commerce Clause.[33] The Court's clearest statement in cases involving the Foreign Commerce Clause is that Congress's powers under the Foreign Commerce Clause are broader than those it possesses under the Interstate Commerce Clause.[34] The Court has never articulated a more specific connection between the two clauses.[35]

Raich, the Court held that Congress's Interstate Commerce Clause authority includes the power to prohibit the local cultivation and use of marijuana in compliance with state law. *See id.* at 2198–99, 2201. Although *Clark*—the only U.S. Court of Appeals decision employing a Foreign Commerce Clause analysis after *Raich*—acknowledged that *Raich* took a "took a more generous view of Congress's power over interstate commerce than seen in *Lopez* and *Morrison*," United States v. Clark, 435 F.3d 1100, 1112 (9th Cir. 2006), *Clark* still relied primarily on the U.S. Supreme Court's reasoning in *Lopez* and *Morrison* in deciding whether Congress acted within its Foreign Commerce Clause power. *See id.* at 1115. Accordingly, *Lopez* and *Morrison* will remain the focus of this Comment.

31. U.S. CONST. art. 1, § 8, cl. 3; *see Lopez*, 514 U.S. at 556.

32. *Clark*, 435 F.3d at 1113.

33. The U.S. Supreme Court has undertaken limited discussion of Congress's Foreign Commerce Clause authority in cases involving states attempting to regulate the instrumentalities of foreign commerce. *E.g.*, Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 444–54 (1979). In *Japan Line*, the Court outlined the "negative implications" of Congress's Foreign Commerce Clause power by holding that a state property tax on cargo containers used exclusively in foreign commerce was unconstitutional. *Id.* In reaching this conclusion, the Court stated that "[f]oreign commerce is preeminently a matter of national concern," and cited an earlier decision in which the Court recognized "the Framers' overriding concern that 'the Federal Government must speak with one voice when regulating commercial relations with foreign governments.'" *Id.* at 448–49 (quoting Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976)).

34. *Id.* at 448 ("Although the Constitution, Art. I, § 8, cl. 3, grants Congress power to regulate commerce 'with foreign Nations' and 'among the several States' in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater.").

35. *See supra* note 33 (describing the U.S. Supreme Court's limited analysis of the Foreign Commerce Clause).

B. United States v. Lopez *and* United States v. Morrison *Demonstrate that Congress's Commerce Clause Authority is Limited*

Although Congress has great latitude in enacting legislation under its Commerce Clause authority,[36] the concept of enumerated powers—the notion that every law Congress enacts must stem from its enumerated authority in the Constitution[37]—requires that Congress's Commerce Clause authority not exceed certain outer limits.[38] Most of the Court's decisions on the scope of Congress's Commerce Clause authority concern Congress's regulation of commerce "among the several States."[39] In these decisions, the Court has recognized Congress's broad power under the Commerce Clause to regulate interstate commerce.[40] Indeed, the Court requires a "plain showing" that Congress has exceeded its Commerce Clause authority before it will invalidate a statute.[41] Nonetheless, in addressing Interstate Commerce Clause challenges, the Court has reiterated the axiom that our federal government is one of enumerated powers,[42] and, as such, there are limits as to how far Congress's Commerce Clause authority extends.[43]

Congress lacks authority under the Interstate Commerce Clause to enact a statute unless the statute either: (1) regulates the use of the channels of interstate commerce;[44] (2) regulates and protects the instrumentalities of interstate commerce, or persons or things in interstate commerce;[45] or (3) regulates activity that substantially affects interstate commerce.[46] For example, in *Lopez*, the Court held that the Gun-Free School Zones Act of 1990 (GFSZA),[47] which made it a federal

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36. *See* United States v. Morrison, 529 U.S. 598, 608 (2000).

37. *E.g.*, *id.* at 607 ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution."); United States v. Lopez, 514 U.S. 549, 552 (1995) ("The Constitution creates a Federal Government of enumerated powers.").

38. *Morrison*, 529 U.S. at 608 (citing *Lopez*, 514 U.S. at 557).

39. United States v. Clark, 435 F.3d 1100, 1111 (9th Cir. 2006).

40. *See, e.g.*, *Morrison*, 529 U.S. at 608.

41. *E.g.*, *id.* at 607.

42. *See, e.g.*, *id.* ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution."); *Lopez*, 514 U.S. at 552 ("The Constitution creates a Federal Government of enumerated powers.").

43. *See Morrison*, 529 U.S. at 608 (citing *Lopez*, 514 U.S. at 557).

44. *See, e.g.*, *id.* at 607.

45. *See, e.g.*, *id.*

46. *See, e.g.*, *id.*

47. Pub. L. No. 101-647, § 1702, 104 Stat. 4844, *invalidated by Lopez*, 514 U.S. at 552.

offense for an individual knowingly to possess a firearm in a school zone,[48] was an unconstitutional exercise of Congress's Commerce Clause authority.[49] The Court reached a similar conclusion in *Morrison*, holding that section 40302 of the Violence Against Women Act of 1994 (VAWA),[50] which allowed victims of gender-motivated violent crimes to recover from the perpetrators of those crimes,[51] exceeded Congress's power under the Commerce Clause.[52] The Court in *Lopez* explained that upholding the statute would require converting the Commerce Clause to a general police power.[53] The Court was unwilling to adopt such an expansive interpretation partly because it "would require [the Court] to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated."[54]

1. Where Congress Seeks to Regulate Criminal Conduct Occurring Outside the Channels of Interstate Commerce, It Fails to Satisfy the Channels Prong of Interstate Commerce Clause Analysis

In *Lopez*, the GFSZA did not satisfy the channels prong of the Interstate Commerce Clause framework because it regulated criminal conduct occurring outside the channels of interstate commerce.[55] Instead, the GFSZA made it a federal offense for an individual knowingly to possess a firearm in a school zone.[56] The Court explained that the GFSZA did not prohibit the movement of firearms in the channels of interstate commerce or otherwise regulate the use of the channels of interstate commerce.[57]

In *Morrison*, the Court similarly concluded that VAWA did not fall within the channels prong.[58] The Court reasoned that VAWA prohibited gender-motivated violence regardless of whether the violence involved

48. *See id.* at 4844.

49. *Lopez*, 514 U.S. at 552.

50. Pub. L. No. 103-322, 108 Stat. 1902, 1941–42, *invalidated by Morrison*, 529 U.S. at 602.

51. *See id.*

52. *Morrison*, 529 U.S. at 602.

53. *Lopez*, 514 U.S. at 567.

54. *Id.*

55. *See id.* at 559.

56. Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, § 1702, 104 Stat. 4844, 4844, *invalidated by Lopez*, 514 U.S. at 552.

57. *See Lopez*, 514 U.S. at 569.

58. *See Morrison*, 529 U.S. at 609.

the use of the channels of interstate commerce.[59] Absent any tangible link to the channels of interstate commerce, VAWA could not be interpreted as regulating the use of the channels of interstate commerce.[60]

2. Where Congress Seeks to Regulate Criminal Conduct Occurring Outside the Channels of Interstate Commerce, It Is Not Protecting the Instrumentalities of, or Persons or Things in, Interstate Commerce

Lopez and *Morrison* also summarily concluded that the instrumentalities prong of the Interstate Commerce Clause framework did not apply because, again, the statutes regulated criminal conduct occurring outside the channels of interstate commerce.[61] In both decisions, the conclusion seemed self-evident.[62] *Lopez* held that the instrumentalities prong was inapplicable because the GFSZA did not protect an instrumentality or thing in interstate commerce.[63] *Morrison* also concluded that the instrumentalities prong did not apply because VAWA was concerned with gender-motivated violence wherever it occurred and was not directed at the instrumentalities of, or persons or things in, interstate commerce.[64]

3. Absent a Statutory Economic Component, Statutes that Regulate Criminal Conduct Occurring Outside the Channels of Interstate Commerce Are Not Justified Under the Substantially Affects Prong

In *Lopez* and *Morrison*, the Court focused its analysis on whether the challenged statute satisfied the third prong of the Interstate Commerce Clause framework, namely Congress's power to regulate activity that substantially affects interstate commerce.[65] The substantially affects prong is typically used to justify the regulation of intrastate commercial activity that nevertheless has a substantial effect on interstate

59. *See id.*

60. *See id.*

61. *See id.*; *Lopez*, 514 U.S. at 559.

62. *See Morrison*, 529 U.S. at 609; *Lopez*, 514 U.S. at 559.

63. *See Lopez*, 514 U.S. at 559.

64. *See Morrison*, 529 U.S. at 609.

65. *See id.* at 609–19; *Lopez*, 514 U.S. at 559–68.

commerce.[66] Only statutes that contain an economic component have been upheld under the substantially affects prong.[67]

In *Lopez*, the absence of any economic component in the GFSZA was essential to the Court's holding that the GFSZA failed to satisfy the substantially affects prong.[68] The GFSZA was a criminal statute that bore no direct relation to commerce, an economic enterprise, or any larger regulation of economic activity.[69] In prior decisions, the Court had only upheld statutes under the substantially affects prong where the regulated activity arose out of, or was connected with, a commercial transaction that in the aggregate substantially affects interstate commerce.[70] In light of the fact that the criminal activity regulated by the GFSZA did not, as a whole, substantially affect interstate commerce, the Court concluded that the GFSZA exceeded Congress's power under the substantially affects prong.[71]

In *Morrison*, the Court held that VAWA did not satisfy the substantially affects prong of the framework after finding that it did not contain an economic component.[72] The Court explained that the economic nature of the regulated activity plays a central role in determining whether a statute satisfies the substantially affects prong;[73] indeed, only statutes that contain an economic component have been upheld under the substantially affects prong.[74] Because VAWA regulated gender-motivated, violent crimes that were entirely unrelated to economic activity, the Court concluded that VAWA failed to satisfy the substantially affects prong.[75]

In both *Lopez* and *Morrison*, the Court recognized that a statutory economic component prevents unlimited exercise of Congress's Commerce Clause authority under the substantially affects prong.[76] In

66. *See, e.g.*, *Lopez*, 514 U.S. at 559–61.

67. *See Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 559–61.

68. *See Lopez*, 514 U.S. at 561, 563–68; *see also Morrison*, 529 U.S. at 610 (stating "a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case").

69. *See Lopez*, 514 U.S. at 561.

70. *See id.*

71. *See id.* at 561–68.

72. *See Morrison*, 529 U.S. at 610–19.

73. *See id.* at 610.

74. *See id.* at 613.

75. *See id.* at 613–19.

76. *See id.* at 610–19; *Lopez*, 514 U.S. at 563–68.

Lopez, for example, the Court found the GFSZA's link between gun possession and commerce too attenuated.[77] The Court rejected the argument that gun possession in a school zone may result in violent crime, and that violent crime, in turn, saddles the national economy with substantial costs and inhibits national productivity because individuals are unwilling to travel to unsafe areas.[78] The Court explained that this kind of reasoning would enable Congress to regulate nearly anything.[79] Although the Court's concern was directed primarily at the potential obliteration of the Constitution's distinction between national and local authority,[80] the Court stressed the importance of adhering to the axiom that the Constitution creates a federal government of enumerated powers.[81] The Constitution deliberately withholds from Congress plenary police power to enact every type of legislation.[82]

In sum, the Court has acknowledged that Congress has broad power under the Commerce Clause and that Congress's Foreign Commerce Clause power is greater than its Interstate Commerce Clause power. Nevertheless, the Court has also recognized that Congress's Commerce Clause authority is limited because our Constitution creates a federal government of enumerated powers. In *Lopez* and *Morrison*, the Court adhered to this notion of enumerated authority by invalidating statutes enacted under the Interstate Commerce Clause that did not contain an economic component.

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77. *See Lopez*, 514 U.S. at 563–68; *see also Morrison*, 529 U.S. at 612 (stating "our decision in *Lopez* rested in part on the fact that the link between gun possession and a substantial effect on interstate commerce was attenuated").

78. *See Lopez*, 514 U.S. at 563–64.

79. *See id.* at 564; *see also Morrison*, 529 U.S. at 615–19 (rejecting the same reasoning advanced by the Government in *Lopez* because it would enable Congress to regulate nearly anything).

80. *See Lopez*, 514 U.S. at 567–68.

81. *See id.* ("Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, *and* that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.") (citations omitted) (emphasis added).

82. *See id.* at 566; *see also Morrison*, 529 U.S. at 618 n.8 ("With its careful enumeration of federal powers and explicit statement that all powers not granted to the Federal Government are reserved, the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate.").

III. COURTS HAVE APPLIED INTERSTATE COMMERCE CLAUSE ANALYSIS IN FOREIGN COMMERCE CASES

In two decisions, *United States v. Cummings*[83] and *United States v. Bredimus*,[84] U.S. Courts of Appeals employed the U.S. Supreme Court's Interstate Commerce Clause analysis in evaluating whether statutes exceeded Congress's authority under the Foreign Commerce Clause.[85] *Cummings* and *Bredimus* held that the challenged statutes withstood Foreign Commerce Clause scrutiny because they satisfied the channels prong of the Interstate Commerce Clause framework—they regulated a wrongful use of the channels of foreign commerce.[86] By employing the Interstate Commerce Clause framework, *Cummings* and *Bredimus* suggest that the constitutional concerns informing the U.S. Supreme Court's analysis under the Interstate Commerce framework also impose limitations on Congress's Foreign Commerce Clause authority.[87]

The first decision to employ the U.S. Supreme Court's Interstate Commerce Clause framework in the context of foreign commerce was *Cummings*.[88] In *Cummings*, the Ninth Circuit examined the constitutionality of 18 U.S.C. § 1204(a),[89] which criminalizes the retention of a kidnapped child in a foreign country.[90] The Government charged Cole Cameron Cummings under § 1204(a) for taking two of his children to Germany and retaining them there in violation of the parental rights of the children's mother.[91]

The *Cummings* court rejected the Foreign Commerce Clause challenge against § 1204(a) because the statute removed an impediment

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83. 281 F.3d 1046 (9th Cir. 2002).

84. 352 F.3d 200 (5th Cir. 2003).

85. *See Bredimus*, 352 F.3d at 205; *Cummings*, 281 F.3d at 1049.

86. *See Bredimus*, 352 F.3d at 205–08; *Cummings*, 281 F.3d at 1050.

87. *See Bredimus*, 352 F.3d at 204–08; *Cummings*, 281 F.3d at 1048–51.

88. *See Cummings*, 281 F.3d at 1049.

89. *See id.* at 1048.

90. *See* 18 U.S.C. § 1204(a) (2000) ("Whoever removes a child from the United States or retains a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights shall be fined under this title or imprisoned not more than 3 years, or both."). Since *Cummings*, § 1204(a) has been amended to include a prohibition against persons who "attempt to" remove a child from the United States. *See* 18 U.S.C.A. § 1204(a) (West 2000 & Supp. 2006) ("Whoever removes a child from the United States, *or attempts to do so*, or retains a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights shall be fined under this title or imprisoned not more than 3 years, or both.") (emphasis added).

91. *See Cummings*, 281 F.3d at 1048.

to a child's unobstructed use of the channels of foreign commerce.[92] The *Cummings* court reasoned that if a child is wrongfully retained in a foreign country, the child cannot freely use the channels of foreign commerce to return to America.[93] Section 1204(a) prohibits this wrongful retention and thereby eliminates an impediment on the use of the channels of foreign commerce.[94] The court's analysis implies that the constitutional concerns informing the U.S. Supreme Court's analysis under the Interstate Commerce Clause framework also impose limitations on Congress's Foreign Commerce Clause power.[95]

The second court of appeals decision to employ the U.S. Supreme Court's Interstate Commerce Clause framework in the foreign commerce arena was *Bredimus*, a decision that resembles *Cummings* in many respects.[96] In *Bredimus*, the Fifth Circuit analyzed 18 U.S.C. § 2423(b),[97] which prohibited U.S. citizens and permanent residents from traveling in foreign commerce *for the purpose of* engaging in sexual activity with a person under eighteen years of age.[98] Nicholas Bredimus was charged under § 2423(b) for traveling to Thailand with the intention of making videotapes and digital images of Thai children engaged in sexually explicit conduct.[99] He pleaded guilty and later challenged the validity of

92. *See id.* at 1050.

93. *See id.*

94. *See id.*

95. *See id.* at 1048–51.

96. *See* United States v. Bredimus, 352 F.3d 200, 205–08 (5th Cir. 2003).

97. *See id.* at 202–08. *Bredimus* construed former subsection (b), which is substantively the same as the current version. *Compare* 18 U.S.C. § 2423(b) (2000) ("TRAVEL WITH INTENT TO ENGAGE IN SEXUAL ACT WITH A JUVENILE.—A person who travels in interstate commerce, or conspires to do so, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, or conspires to do so, for the purpose of engaging in any sexual act (as defined in section 2246) with a person under 18 years of age that would be in violation of chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States shall be fined under this title, imprisoned not more than 15 years, or both.") *with* 18 U.S.C. § 2423(b) (West 2000 & Supp. 2006) ("Travel with intent to engage in illicit sexual conduct.—A person who travels in interstate commerce or travels into the United States, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.").

98. *See* 18 U.S.C. § 2423(b) (2000) (stating "a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, or conspires to do so, *for the purpose of* engaging in any sexual act (as defined in section 2246) with a person under 18 years of age that would be in violation of chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States shall be fined under this title, imprisoned not more than 15 years, or both") (emphasis added).

99. *See Bredimus*, 352 F.3d at 202.

his guilty plea by arguing that § 2423(b) was unconstitutional under the Foreign Commerce Clause.[100]

The *Bredimus* court rejected the defendant's guilty plea challenge after finding that § 2423(b) regulated the channels of foreign commerce.[101] In analyzing § 2423(b), the court relied on several decisions upholding statutes that criminalized the actions of persons who use the channels of commerce with the intent to engage in wrongful activity.[102] Primarily, the court relied on a Second Circuit decision upholding the part of § 2423(b) that criminalized travel in interstate commerce for the purpose of engaging in sexual activity with a minor.[103] The court found no reason to disagree with this analogous, interstate commerce precedent, and, accordingly, concluded that § 2423(b) withstood constitutional scrutiny.[104]

In analyzing the case in this manner, the court in *Bredimus*—like the court in *Cummings*—implied that the constitutional concerns informing the U.S. Supreme Court's analysis under the Interstate Commerce Clause framework also limit Congress's power under the Foreign Commerce Clause.[105] This implication can be drawn even though both courts acknowledge that Congress's power under the Foreign Commerce Clause is broader than its power under the Interstate Commerce Clause.[106] However, neither *Cummings* nor *Bredimus* actually invalidated a statute on the basis of the U.S. Supreme Court's constitutional concerns in the interstate context.[107] Thus, neither decision provides a clear picture of the contours of Congress's Foreign Commerce Clause power.

In sum, *Cummings* and *Bredimus* employed the U.S. Supreme Court's Interstate Commerce Clause framework when analyzing challenges to congressional power under the Foreign Commerce Clause. *Cummings* and *Bredimus* held that the challenged statutes withstood Foreign Commerce Clause scrutiny because they regulated a wrongful use of the

100. *See id.* at 201.

101. *See id.* at 205–08.

102. *See id.* at 205–07.

103. *See id.* at 205–06 (citing United States v. Han, 230 F.3d 560, 565 (2d Cir. 2000)).

104. *See id.* at 207–08.

105. *See id.* at 204–08.

106. *See id.* at 208 (citing Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1979)); United States v. Cummings, 281 F.3d 1046, 1049 n.1 (9th Cir. 2002) (citing *Japan Line*, 441 U.S. at 448).

107. *See Bredimus*, 352 F.3d at 205–08; *Cummings*, 281 F.3d at 1050.

channels of foreign commerce. Although *Cummings* and *Bredimus* acknowledge that Congress's power under the Foreign Commerce Clause is greater than its power under the Interstate Commerce Clause, their use of the framework implies that the constitutional concerns informing the U.S. Supreme Court's analysis under the Interstate Commerce Clause framework also impose limitations on Congress's Foreign Commerce Clause authority.

IV. ONE CIRCUIT COURT REQUIRES A "CONSTITUTIONALLY TENABLE NEXUS" WITH FOREIGN COMMERCE

A competing approach to analyzing Foreign Commerce Clause challenges—created by the Ninth Circuit Court of Appeals decision in *United States v. Clark*[108]—attempts to distance itself from the U.S. Supreme Court's Interstate Commerce Clause analysis.[109] Under the *Clark* approach, Congress may enact laws under its Foreign Commerce Clause power if those laws have a constitutionally tenable nexus with foreign commerce.[110] To establish this nexus with foreign commerce, a statute must contain an economic component.[111]

In June 2003, Cambodian authorities arrested a seventy-one-year-old U.S. citizen named Michael Lewis Clark in Phnom Penh, Cambodia and charged him with debauchery for having sex with two underage boys.[112] With the Cambodian government's permission, the U.S. government began an investigation.[113] Clark ultimately confessed and returned to the United States to face indictment under 18 U.S.C. § 2423(c) and (e),[114] which criminalizes the overseas illicit sexual conduct (or attempted conduct) of U.S. citizens and permanent residents.[115] Clark pleaded guilty to two counts under § 2423(c) and (e), but reserved his right to challenge the constitutionality of the statute.[116] On appeal, Clark

108. 435 F.3d 1100 (9th Cir. 2006).

109. *See id.* at 1103.

110. *See id.* at 1114.

111. *See id.* at 1114–17.

112. *See id.* at 1103.

113. *See id.* at 1103–04.

114. *See id.* at 1104.

115. *See* 18 U.S.C.A. § 2423(c) (West 2000 & Supp. 2006); *id.* § 2423(e) ("Attempt and conspiracy.—Whoever attempts or conspires to violate subsection (a), (b), (c), or (d) shall be punishable in the same manner as a completed violation of that subsection.").

116. *See Clark*, 435 F.3d at 1104.

contended that Congress had exceeded its authority under the Foreign Commerce Clause in enacting § 2423(c).[117]

The court initially declined to follow the Interstate Commerce Clause framework.[118] It drew a sharp distinction between Congress's Foreign Commerce Clause power and its Interstate Commerce Clause power by noting that the Founders intended the scope of the Foreign Commerce Clause power to be greater.[119] In the court's view, adapting the Interstate Commerce Clause framework to the context of foreign commerce—the approach taken by *Cummings* and *Bredimus*—is sometimes inappropriate.[120] The court explained that the Interstate Commerce Clause framework was developed in light of federalism and state sovereignty concerns that are absent in foreign affairs.[121]

Consequently, instead of employing the U.S. Supreme Court's Interstate Commerce Clause framework, the *Clark* court decided to take a "global, commonsense approach to the circumstances presented [by the case]."[122] This commonsense approach entailed "look[ing] to the text of § 2423(c) [and (f)(2)] to discern whether it has a constitutionally tenable nexus with foreign commerce."[123] Following this pronouncement, the *Clark* court restated in seemingly broader terms that the inquiry involves determining "whether the statute bears a rational relationship to Congress's authority under the Foreign Commerce Clause."[124]

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117. *See id.*

118. *See id.* at 1103. Judges McKeown and Hug formed a majority in this three-judge panel decision. *See id.* at 1102. Judge Ferguson filed a dissenting opinion rejecting the majority opinion's Foreign Commerce Clause analysis. *See id.* at 1117–21 (Ferguson, J., dissenting).

119. *See id.* at 1103 (quoting Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1979)).

120. *See id.* at 1116.

121. *See id.* at 1103, 1113–14.

122. *Id.* at 1103.

123. *Id.* at 1114.

124. *See id.* at 1114. Again, in spite of its earlier dismissal of the Interstate Commerce Clause framework, the *Clark* court appears to employ aspects of the framework's third prong. *See id.* ("Taking a page from *Raich*, we review the statute under the traditional rational basis standard." (citing Gonzalez v. Raich, 545 U.S. 1, 125 S. Ct. 2195, 2211 (2005)); *see also id.* at 1118 n.1 (Ferguson, J., dissenting) ("Courts apply rationality review to assess whether Congress had a 'rational basis' for concluding that a particular activity 'substantially affects' interstate commerce, not to inquire generally 'whether the statute bears a rational relationship to Congress's authority under the [ ] Commerce Clause.'") (citations omitted)); *cf. Raich*, 125 S. Ct. at 2208 ("We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding.") (quoting United States v. Lopez, 514 U.S. 549, 557 (1995)).

Applying this global approach, the *Clark* court concluded that § 2423(f)(2) satisfied the rational nexus requirement.[125] The court analyzed the two elements required under § 2423(f)(2) independently to illustrate why the statute fairly relates to foreign commerce.[126] First, to trigger the statute, a person must travel in foreign commerce.[127] According to the court, this element clearly establishes that Congress *invoked* the Foreign Commerce Clause.[128] To satisfy the second element, a person must then engage in a commercial sex act with a person under eighteen years of age.[129] Because the U.S. Supreme Court has long recognized that the Commerce Clause covers all commercial activity between the United States and foreign nations, the *Clark* court concluded that the Foreign Commerce Clause covers the second element of § 2423(f)(2)—the commercial activity of sex with minors overseas in exchange for money.[130]

Despite its earlier dismissal of the Interstate Commerce Clause framework,[131] the *Clark* court conceded that the framework may provide guidance in analyzing cases under the Foreign Commerce Clause.[132] Significantly, the court devoted part of its analysis to distinguishing § 2423(f)(2) from the U.S. Supreme Court's concerns in *Lopez* and *Morrison*.[133] The *Clark* court reiterated the U.S. Supreme Court's concern with Congress using the Commerce Clause to enact criminal statutes that are entirely unrelated to commercial activity or economic enterprise.[134] According to the court, § 2423(f)(2), despite its criminal nature,[135] avoids these concerns because the second element of the

125. *See Clark*, 435 F.3d at 1114–17.

126. *See id.* at 1114–15.

127. *See* 18 U.S.C.A. § 2423(c) (West 2000 & Supp. 2006); *Clark*, 435 F.3d at 1114.

128. *See Clark*, 435 F.3d at 1114.

129. *See* 18 U.S.C.A. § 2423(c), (f); *Clark*, 435 F.3d at 1114–15.

130. *See Clark*, 435 F.3d at 1113–15.

131. *See id.* at 1103.

132. *See id.* at 1116.

133. *See id.* at 1115.

134. *See id.* (quoting United States v. Morrison, 529 U.S. 598, 610 (2000)).

135. The court cited several decisions involving statutes enacted under Congress's Foreign Commerce Clause power that regulate crimes with an economic facet. *See id.* at 1115–16 (citing United States v. Kay, 359 F.3d 738, 741 (5th Cir. 2004) (Foreign Corrupt Practices Act of 1977, Pub. L. 95-213, 91 Stat. 1494); United States v. Hsu, 155 F.3d 189, 195–96 (3d Cir. 1998) (Economic Espionage Act of 1996, Pub L. 104-294, 110 Stat. 3488); and United States v. Gertz, 249 F.2d 662, 666–67 (9th Cir. 1957) (statute criminalizing the forging or counterfeiting of foreign currency)).

statute regulates activity that is "quintessentially economic"[136]—again, sex with minors overseas in exchange for money.[137]

The key role that the second element of § 2423(f)(2) played in both demonstrating how the statute fairly relates to foreign commerce and distinguishing *Lopez* and *Morrison* implies that a statutory economic component is required to establish a constitutionally tenable nexus with foreign commerce.[138] The court strongly implied that *both* elements of § 2423(f)(2) were necessary to satisfy the constitutionally tenable nexus approach.[139] Although the travels in foreign commerce element invoked the Foreign Commerce Clause, the court never considered whether the first element was sufficient on its own to uphold the statute.[140] The court's analysis suggests that the economic component inherent in the commercial sex with minors overseas element of § 2423(f)(2) was critical to the court's outcome.[141] The court used the economic component both to demonstrate how § 2423(f)(2) fairly relates to foreign commerce and to distinguish § 2423(f)(2) from the invalidated statutes in *Lopez* and *Morrison* that did not include an economic component.[142] Notably, the economic requirement implicit in the *Clark* court's constitutionally tenable nexus approach appears to be identical to the implicit economic requirement of the Interstate Commerce Clause framework's substantially affects prong.[143] Thus, satisfaction of the constitutionally tenable nexus requirement would appear to imply satisfaction of the substantially affects prong.

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136. *Id.* at 1115 (quoting Gonzalez v. Raich, 545 U.S. 1, 125 S. Ct. 2205, 2211 (2005)).

137. *See* 18 U.S.C.A. § 2423(c), (f).

138. *See id.* at 1114–17.

139. *See id.* at 1103 ("Where, as in this appeal, the defendant travels in foreign commerce to a foreign country and offers to pay a child to engage in sex acts, his conduct falls under the broad umbrella of foreign commerce and consequently within congressional authority under the Foreign Commerce Clause."); *id.* at 1114 ("We hold that § 2423(c)'s combination of requiring travel in foreign commerce, coupled with engagement in a commercial transaction while abroad, implicates foreign commerce to a constitutionally adequate degree."); *id.* at 1116 ("The combination of Clark's travel in foreign commerce and his conduct of an illicit commercial sex act in Cambodia shortly thereafter puts the statute squarely within Congress's Foreign Commerce Clause authority."); *id.* at 1117 ("The fact that §[ ] 2423(c) and (f)(2) meld[s] these economic and criminal components into a single statue does not put the conduct beyond Congress's reach under the Foreign Commerce Clause.").

140. *See id.* at 1114–17.

141. *See id.*

142. *See id.*

143. *See id.*

In sum, the *Clark* court requires that the text of a statute demonstrate a constitutionally tenable nexus with foreign commerce in order to survive Foreign Commerce Clause scrutiny. The *Clark* court found that § 2423(f)(2) establishes this nexus because the statute regulates commercial activity, which both fairly relates to foreign commerce and is distinguishable from the invalidated statutes in *Lopez* and *Morrison* that did not include an economic component. By requiring an economic component, the constitutionally tenable nexus analysis appears to adopt the implicit economic requirement of the Interstate Commerce Clause framework's substantially affects prong.

V. SECTION 2423(F)(1) FAILS TO WITHSTAND FOREIGN COMMERCE CLAUSE SCRUTINY

Under the Foreign Commerce Clause analyses laid out by the U.S. Courts of Appeals,[144] Congress exceeded its Foreign Commerce Clause authority when it enacted § 2423(f)(1). Although the U.S. Supreme Court has recognized that Congress has broad power under the Foreign Commerce Clause,[145] the Court's Interstate Commerce Clause decisions adhere to the axiom that the Constitution creates a federal government of enumerated powers. Congress's enumerated Commerce Clause authority is thus constitutionally limited.[146] To that end, U.S. Courts of Appeals have employed two analyses to determine the constitutionality of a statute under the Foreign Commerce Clause.[147] Section 2423(f)(1) fails to withstand Foreign Commerce Clause scrutiny under the channels or instrumentalities prongs of the Interstate Commerce Clause framework employed by *Cummings* and *Bredimus*[148] because the statute regulates criminal conduct occurring outside the channels of foreign commerce.[149] It likewise fails the analysis advanced by *Clark* because the statute does not include the economic component necessary to establish a constitutionally tenable nexus with foreign commerce.[150] Accordingly,

144. *See id.* at 1109–17; United States v. Bredimus, 352 F.3d 200, 204–08 (5th Cir. 2003); United States v. Cummings, 281 F.3d 1046, 1048–51 (9th Cir. 2002).

145. *See* United States v. Morrison, 529 U.S. 598, 608 (2000).

146. *See id.* at 607–08.

147. *See Clark* 435 F.3d at 1109–17; *Bredimus*, 352 F.3d at 204–08; *Cummings*, 281 F.3d at 1048–51.

148. *See Bredimus*, 352 F.3d at 205; *Cummings*, 281 F.3d at 1049.

149. *Cf. Morrison*, 529 U.S. at 609; *Lopez*, 514 U.S. at 559.

150. *See Clark*, 435 F.3d at 1114–17.

§ 2423(f)(1) does not satisfy the substantially affects prong of the framework employed by *Cummings* and *Bredimus* because of the absence of a statutory economic component.[151]

A. Section 2423(f)(1) Does Not Satisfy the Interstate Commerce Clause Framework

Cummings and *Bredimus* held that the challenged statutes withstood Foreign Commerce Clause scrutiny because they regulated a wrongful use of the channels of foreign commerce.[152] In reaching these holdings, the Fifth and Ninth Circuits deliberately employed the U.S. Supreme Court's Interstate Commerce Clause framework.[153] This suggests that the constitutional concerns driving the U.S. Supreme Court to recognize limitations on Congress's Interstate Commerce Clause power also impose limitations on Congress's Foreign Commerce Clause power.[154] Accordingly, decisions where the U.S. Supreme Court has invalidated a statute under the Interstate Commerce Clause framework—like *Lopez* and *Morrison*[155]—shed light on the circumstances under which a court might invalidate congressional acts under the Foreign Commerce Clause. In *Lopez* and *Morrison*, the Court found that congressional attempts to regulate criminal activity occurring outside the channels of commerce did not satisfy the channels or instrumentalities prongs of the Interstate Commerce Clause framework.[156]

Section 2423(f)(1) does not satisfy the channels or instrumentalities prongs of the framework employed by *Cummings* and *Bredimus* because it regulates criminal conduct occurring outside the channels of foreign commerce.[157] Although § 2423(f)(1) contains an element requiring travel in foreign commerce, this provision's criminalization of noncommercial sexual abuse of minors overseas is not obviously related to the channels of foreign commerce.[158] The statute upheld in *Bredimus*, § 2423(b),

151. *See Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 559–61.

152. *See Bredimus*, 352 F.3d at 205–08; *Cummings*, 281 F.3d at 1050.

153. *See Bredimus*, 352 F.3d at 205; *Cummings*, 281 F.3d at 1049.

154. *See Bredimus*, 352 F.3d at 204–08; *Cummings*, 281 F.3d at 1048–51.

155. *See Morrison*, 529 U.S. at 601–19; *Lopez*, 514 U.S. at 551–68.

156. *See Morrison*, 529 U.S. at 609; *Lopez*, 514 U.S. at 559.

157. *See* 18 U.S.C.A. § 2423(c), (f) (West 2000 & Supp. 2006); *Morrison*, 529 U.S. at 609; *Lopez*, 514 U.S. at 559.

158. *See* 18 U.S.C.A. § 2423(c), (f).

illustrates this distinction.[159] It requires that a person travel in foreign commerce with the criminal intent to engage in illicit sexual conduct.[160] Section 2423(f)(1), in contrast, covers persons who travel in foreign commerce with no criminal intent whatsoever.[161] If a person sexually abuses a minor abroad—even years after traveling in foreign commerce—the person violates § 2423(f)(1).[162] Section 2423(f)(1) is thus similar to the statutes that failed to satisfy the channels and instrumentalities prongs of the framework in *Lopez* and *Morrison* because it criminalizes noncommercial sexual abuse of minors overseas regardless of whether the abuse takes place in the channels of commerce.[163] In other words, Congress did not seek to restrict § 2423(f)(1)'s coverage to sexual abuse occurring in the channels of commerce.[164] Accordingly, § 2423(f)(1) fails to satisfy the channels or instrumentalities prongs of the framework because the noncommercial sexual abuse of minors overseas occurs outside the channels of foreign commerce.[165]

The substantially affects prong of the Interstate Commerce Clause framework is subsumed under the *Clark* court's constitutionally tenable nexus approach.[166] Although *Cummings* and *Bredimus* give no guidance in determining whether a statute satisfies the substantially affects prong of the framework,[167] *Clark*, in creating the constitutionally tenable nexus approach, appears to adopt the substantially affects prong's implicit economic requirement.[168] Thus, if § 2423(f)(1) fails to satisfy *Clark*'s constitutionally tenable nexus analysis, § 2423(f)(1) necessarily fails to satisfy the substantially affects prong of the framework employed by *Cummings* and *Bredimus*.[169] Stated another way, § 2423(f)(1) does not

159. *See* 18 U.S.C. § 2423(b) (2000); *Bredimus*, 352 F.3d at 205–08.

160. *See* 18 U.S.C. § 2423(b).

161. *See* 18 U.S.C.A. § 2423(c), (f) (West 2000 & Supp. 2006).

162. *See id.*; United States v. Clark, 435 F.3d 1100, 1119–20 (9th Cir. 2006) (Ferguson, J., dissenting).

163. *See* 18 U.S.C.A. § 2423(c), (f); United States v. Morrison, 529 U.S. 598, 609 (2000); United States v. Lopez, 514 U.S. 549, 559 (1995).

164. *See* 18 U.S.C.A. § 2423(c), (f).

165. *See id.*; *Morrison*, 529 U.S. at 609; *Lopez*, 514 U.S. at 559.

166. *See Clark*, 435 F.3d at 1114–17.

167. *See* United States v. Bredimus, 352 F.3d 200, 204–08 (5th Cir. 2003); United States v. Cummings, 281 F.3d 1046, 1048–51 (9th Cir. 2002).

168. *See Clark*, 435 F.3d at 1114–17.

169. *See Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 559–61; *supra* Part IV (describing the constitutionally tenable nexus analysis).

satisfy the substantially affects prong of the framework if the statute fails the constitutionally tenable nexus analysis.[170] As explained in the following section, § 2423(f)(1) does not demonstrate a constitutionally tenable nexus with foreign commerce.[171] Thus, § 2423(f)(1) also fails to satisfy the substantially affects prong of the framework employed by *Cummings* and *Bredimus*.[172]

B. Section 2423(f)(1) Does Not Demonstrate a Constitutionally Tenable Nexus with Foreign Commerce

Under *Clark*, the text of § 2423(f)(1) must demonstrate a constitutionally tenable nexus with foreign commerce.[173] The *Clark* court held that § 2423(f)(2) established this nexus because that statute regulates commercial activity, which both fairly relates to foreign commerce and is distinguishable from the statutes invalidated in *Lopez* and *Morrison*.[174] Accordingly, to establish a constitutionally tenable nexus with foreign commerce, a statute must include an economic component.[175] Absent this statutory economic requirement, Congress would have plenary power to regulate nearly any criminal activity under its Foreign Commerce Clause power.[176] Although Congress has broad power over foreign affairs,[177] plenary power in this arena would contravene the axiom—reiterated by the U.S. Supreme Court in *Lopez* and *Morrison*[178]—that the Constitution creates a federal government of enumerated powers.[179] The constitutionally tenable nexus approach recognizes this notion of enumerated authority and thus imposes

170. *See Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 559–61; *supra* Part IV (describing the constitutionally tenable nexus analysis).

171. *See infra* Part V.B (analyzing § 2423(f)(1) under the constitutionally tenable nexus analysis).

172. *See Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 559–61; *supra* Part IV (describing the constitutionally tenable nexus analysis).

173. *See Clark*, 435 F.3d at 1114–17.

174. *See id.*

175. *See id.*

176. *See Morrison*, 529 U.S. at 615–19.

177. *See, e.g.*, *Clark*, 435 F.3d at 1109 n.14 (explaining that the focus of the court's review is on the constitutionality of § 2423(c) under the Commerce Clause, but acknowledging that Congress's implied foreign affairs power may provide an adequate basis for enacting § 2423(c)).

178. *See Morrison*, 529 U.S. at 607; United States v. Lopez, 514 U.S. 549, 552 (1995).

179. *See Morrison*, 529 U.S. at 618 n.8; *Lopez*, 514 U.S. at 567–68.

constitutional limitations on Congress's power under the Foreign Commerce Clause.[180]

The text of § 2423(f)(1) fails to demonstrate a constitutionally tenable nexus with foreign commerce under *Clark* because the statute regulates activity that does not include an economic component.[181] Section 2423(f)(1) criminalizes the sexual abuse of minors regardless of whether the abuse takes place in a commercial context.[182] By failing to include a statutory economic component, § 2423(f)(1) exemplifies the strong concerns that the U.S. Supreme Court articulated in *Lopez* and *Morrison*'s substantially affects prong analysis,[183] and that the *Clark* court reiterated in its constitutionally tenable nexus analysis—"Congress's use of the Commerce Clause to enact 'a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms.'"[184] Accordingly, § 2423(f)(1) not only fails to establish a constitutionally tenable nexus with foreign commerce,[185] but also fails to satisfy the substantially affects prong of the framework employed in *Cummings* and *Bredimus*.[186]

In sum, § 2423(f)(1) fails to withstand Foreign Commerce Clause scrutiny under current U.S. Courts of Appeals analyses. Section 2423(f)(1) does not satisfy the channels or instrumentalities prongs of the Interstate Commerce Clause framework employed in *Cummings* and *Bredimus* because the statute regulates criminal conduct occurring outside the channels of foreign commerce. Under *Clark*, § 2423(f)(1) does not establish a constitutionally tenable nexus with foreign commerce because the statute does not contain an economic component. Absent a statutory economic component, § 2423(f)(1) also fails to satisfy the substantially affects prong of the framework.

VI. CONCLUSION

Although the U.S. Supreme Court has not yet ruled any statutes criminalizing the conduct of Americans overseas unconstitutional under

180. *See Clark*, 435 F.3d at 1114–17.

181. *See* 18 U.S.C.A. § 2423(c), (f) (West 2000 & Supp. 2006).

182. *See id.*

183. *See Morrison*, 529 U.S. at 610; *Lopez*, 514 U.S. at 561.

184. *Clark*, 435 F.3d at 1115 (quoting *Morrison*, 529 U.S. at 610).

185. *See Clark*, 435 F.3d at 1114–17.

186. *See supra* text accompanying notes 169–172.

the Foreign Commerce Clause, three U.S. Courts of Appeals decisions use the concept of enumerated powers, important in U.S. Supreme Court decisions that invalidate statutes grounded in the Interstate Commerce Clause, to suggest limitations on Congress's Foreign Commerce Clause power. In *Cummings* and *Bredimus*, the Fifth and Ninth Circuit Courts of Appeals employed the U.S. Supreme Court's three-pronged Interstate Commerce Clause framework when analyzing statutes under the Foreign Commerce Clause. This indicates that the constitutional concerns driving the U.S. Supreme Court to recognize limitations on Congress's Interstate Commerce Clause power also impose limitations on Congress's Foreign Commerce Clause power. In *Clark*, the Ninth Circuit incorporated a similar constitutional limitation, holding that Congress could enact a law under its Foreign Commerce Clause power only if the statute demonstrated a constitutionally tenable nexus with foreign commerce by including an economic component.

Section 2423(f)(1) fails to withstand Foreign Commerce Clause scrutiny under current analyses of the U.S. Courts of Appeals. First, it does not satisfy the channels or instrumentalities prongs of the framework because the statute regulates criminal conduct occurring outside the channels of foreign commerce. Second, the text of § 2423(f)(1) does not demonstrate a constitutionally tenable nexus with foreign commerce because the noncommercial sexual abuse of minors abroad does not include an economic component. Absent a statutory economic component, § 2423(f)(1) also fails to satisfy the substantially affects prong of the framework employed by *Cummings* and *Bredimus*. So long as U.S. Courts of Appeals continue to rely on Interstate Commerce Clause decisions like *Lopez* and *Morrison* in analyzing challenges to Congress's Foreign Commerce Clause power, statutes enacted under the Foreign Commerce Clause will remain subject to the constitutional limitations articulated by the U.S. Supreme Court in the Interstate Commerce Clause context.